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SUBJECT: ROMANIAN JUDICIARY UPDATE: CONSTITUTIONAL STALEMATE AND  
UPCOMING HOT ISSUES

REF: BUCHAREST 448

Sensitive but Unclassified, not for Internet distribution.

¶1. (SBU) Summary: On July 20, the Charge d'Affaires and DOJ RLA met with Prosecutor General Codruta Kovesi, Tom Barnes from the European Commission's Cooperation and Verification Mechanism, and Laura Stefan, anti-corruption expert with the Romanian Academic Society. Issues discussed included the ongoing dispute over judicial bonuses, as well as other upcoming topics of interest in the area: the appointment of a new head of the High Court of Cassation and Justice, the Prosecutor General's re-appointment, preparation of implementing legislation for the new substantive criminal and civil codes, and the consideration of the draft criminal procedure codes. The high-profile dispute over magistrates' bonuses, opposing the judiciary and the executive, amounts to the escalation of what the Constitutional Court recently ruled as a "legal dispute of a constitutional nature" between the three powers. Its sponsors in the judiciary community describe it as a labor dispute. The standoff sent waves through the deficient judiciary system, laid bare the judiciary's apparent misuse of the principle of independence, and further eroded public confidence in the judiciary as an accountable and responsible branch. End Summary.

Judicial Bonuses in Romania: Constitutional Standoff

Background:

¶2. (U) The history of post-1989 Romanian magistrates' compensation packages is long and convoluted. In 1996, a law on magistrates' salaries granted them a series of benefits that substantially increased their salaries. (Note: In Romania judges and prosecutors are both part of the judiciary under the generic name of "magistrates.") In order to contain the ballooning of magistrates' salaries, Cabinet Ordinance 83 issued in 2000 mandated the inclusion of all fringe benefits/bonuses into their base pay and dropped a so-called "stress" bonus amounting to 50 percent of their base pay. Disgruntled magistrates all over the country challenged the ordinance and started suing the government to reclaim payment of the abolished bonus. Some of the suits were successful, others were not. In an effort to institute a unitary practice and in the hope that the highest court would find granting the abolished bonuses illegal, in February 2008 Prosecutor General Codruta Kovesi filed an "appeal the interest of the law" with the High Court of Cassation and Justice (ICCJ), which has the constitutional duty to provide "unitary interpretation and enforcement of the law." However, in its March 10, 2008 ruling, the ICCJ (most of whose members had themselves filed suit on the bonus issue) found that the "judges, prosecutors and the assistants thereof, as well as the relevant auxiliary staff, are entitled to receive a 50 percent bonus for risk and mental stress, calculated against their base salary, even after CO 83/2000 took effect." The ICCJ ruling mandated payment of past-due bonuses and their resumption in the future. In the wake of the ruling, other categories of state employees started to sue the government to reclaim payment of earlier benefits.

¶3. (U) In early May 2009, President Basescu filed a complaint with the Constitutional Court (CC), requesting the Court to determine that a "legal dispute of a constitutional nature" exists between the

judiciary on the one hand, and Parliament and the Romanian Cabinet, on the other. On May 27, 2009, the Constitutional Court found that a legal dispute of a constitutional nature did exist between the judiciary, on the one hand, and Parliament and the Romanian executive on the other. The judiciary had unconstitutionally infringed on the executive and legislative branches' respective duties. The CC determined that "the ICCJ does not have the constitutional jurisdiction that would allow it to institute, amend, or abolish legal provisions that have the power of law, or to review them for constitutionality." Since the Constitutional Court can provide rulings only for the future, final court rulings and enforceable titles concerning compensation for bonuses that were issued before the date of the CC ruling still had to be enforced.

¶4. (U) On July 3, the Justice Ministry and Prosecutor General's office announced that as of June 2009 magistrates' salaries will no longer include the stress bonus. They both cited unavailability of funds as communicated by the Finance Ministry, and the burden already placed on the strapped state budget by the need to cover back payments. PG Kovesi said that the funds needed to cover amounts in past-due bonuses awarded through 2007 and 2008 final court rulings accounted for 96 percent of her office's overall budget for 2009. At the Justice Ministry, Minister Predoiu said 57 percent of the ministry's budget would go to past-due bonus payments. The decision caused outrage among magistrates, who took indignant public stands through the Superior Council of the Magistracy (CSM) and their professional associations. They decided to stop work for several hours a day in protest. The ICCJ and other relevant judiciary bodies immediately sued the Finance Ministry. In the latest twist of the ongoing legal battle opposing magistrates and the Finance Ministry, on July 24, the ICCJ magistrates and auxiliary staff, the National Institute for the Magistracy, and the National School for Clerks won the case against the Finance Ministry over the latter's recent decision to drop the current bonuses. The

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likely appeal will be judged by none other than the ICCJ, one of the litigants in the case.

¶5. (U) The dispute includes public statements and accusations, with the judges taking the position that the failure to pay the bonuses is a violation of their "independence" and of law. Judges have gone on strike, which is illegal. In addition, prosecutors, too, have joined in claiming these bonuses. Judges have also brought legal complaints against the government. These complaints are problematic, since they present myriad recusal and conflict issues that are not being addressed by the Romanian judges. For example, regular litigants' disputes are not heard for months (even time-sensitive ones) by courts citing funding problems, but the complaints by the judges against the government are given immediate calendar dates. In particular, we have been told that money may be diverted from administrative funds, including funds for issuing subpoenas, to pay remuneration to judges. Thus, the courts cry poverty when litigants seek to move their cases, obtain simple administrative services at the courts, or seek subpoenas, although part of the cause of that poverty is an improper diversion of funds.

¶6. (U) The prosecution service faces similar problems, although efforts are being made to address the conflict issues. The Prosecutor General has declared these bonuses to be illegal and directed the prosecutors not to take them or to strike. However, there is no ability to enforce these orders, since the discipline of prosecutors is not controlled by the Prosecutor General, but instead is controlled by the CSM, which would take no action against a prosecutor disregarding the Prosecutor's order. To her credit, the Prosecutor General recognized the obvious conflicts presented by this case in the event a prosecutor who had made a personal claim for the bonus were assigned on a relevant case. It was only with some difficulty that the Prosecutor General was able to identify unconflicted prosecutors for these suits.

¶7. (U) Another issue presented by this ongoing dispute is that it has created perverse incentives for judges who are at retirement age. According to our contacts, there are a substantial number of judges and prosecutors who have retirement papers ready for execution, yet who are delaying their retirement in the hopes that a favorable decision on bonuses may be forthcoming. Pensions for the magistracy are approximately 80% of the last month's compensation. Compensation is not limited to base compensation, but can also

include compensation such as bonuses, or even can include a lump-sum payment of past-due compensation, such as occurs when a judge prevails in a compensation dispute and receives past-due bonuses or salary for periods of years or months. These retirement-ready judges create a drag on an already understaffed system, since they tend not to do their best or most productive work when they are simply marking time before finalizing their retirement at the close of a hoped-for windfall compensation month.

¶8. (SBU) Comment: From a legal and constitutional standpoint, the current dispute over judicial bonuses appears to be a much more fundamental problem than a simple policy or pay dispute. Romanian magistrates contravened 1) a ruling of Romania's Constitutional Court in unconstitutionally granting themselves bonuses and in pursuing them; and 2) orders against the bonuses coming from the Finance Minister, the Minister of Justice, and the Prosecutor General. Most troubling, the ring-leaders of this judicial revolt seem to be the very judges who are members of the bodies that one would most expect to discipline improper judicial conduct and rein in improper applications and interpretations of law: the Superior Council of Magistracy and the High Court of Cassation and Justice. End Comment.

¶9. (SBU) In a conversation on the issue with a Mission Political Specialist on July 24, the President's advisor for legal and constitutional issues described three possible avenues out of the stalemate: 1) A legal/constitutional one that would involve lodging another complaint with the Constitutional Court (such as the one the President filed in May); 2) An executive/ legislative one in which the Cabinet would take a tough stance and, by executive order, force magistrates of retirement age to leave the system, and in the longer run, pass a government-wide civil service compensation plan by legislation, including for the judiciary; 3) A political one in which the President would act as mediator between the parties involved. Such President-sponsored mediation, as requested by the CSM and the Justice Minister, may likely happen next week, according to the President's legal advisor.

Romanian Judiciary: Upcoming Justice Sector Hot Spots

¶10. (SBU) As described by our contacts, there will be four hot spots to watch in the upcoming months that have the potential to influence the system. First, the appointment of the new head of the High Court of Cassation and Justice is key. One of the leading candidates, Lidia Barbulescu, would be a troublesome choice. She is one of the leaders of the pro-bonus campaign, and her aggressive efforts in this regard may be calculated to engender support among the judiciary and promote her candidacy. (Note and comment: A former CSM head and current ICCJ vice chair, Judge Lidia Barbulescu was notoriously averse to opening up the system and doing away with magistrates' special pensions. She has been an opponent of

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President Basescu and former Justice Minister Monica Macovei.).

¶11. (U) Second, the possible re-appointment of the Prosecutor General. The Prosecutor General enjoys the support of all who seriously oppose corruption in Romania. Her mandate expires October 1 (two months before the likely date of the presidential elections). The Prosecutor General plans to submit a report of her accomplishments to the President, and then discuss with him his plans for her position.

¶12. (U) Third, the implementing legislation for the new substantive criminal and civil codes must be closely watched. The codes have been adopted, but the next step will be the technical drafting of legislation that will implement those codes, and abrogate old law that is inconsistent with the new codes. Partly because this is such a detailed and technical process, there may be a risk of mischief in the manner in which it is carried out. (Reftel: A recent emergency ordinance allowing the Cabinet to amend legislation before it went into force, with the ostensible aim to clear the way for the new codes, caused a small uproar. PM Emil Boc committed to using it only for getting rid of an old but never-enforced version of the codes.)

¶13. (SBU) Fourth, starting in September, the criminal procedure code will be considered in Parliament. The current draft is pretty good, but there are a number of areas that will be subject to disagreements and those disagreements may result in alterations that would be detrimental to Romania's law enforcement efforts. In addition, the procedural code as drafted contains major changes,

including the introduction of plea bargaining for cases subject to less than five years' maximum imprisonment, and introduction of the "opportunity principle" -- prosecutorial discretion not to pursue cases or charges.

¶14. (SBU) Comment: If enacted, these changes will require a major shift in the mindset of prosecutors, and unless these new authorities are carried out in a fair, just, and principled fashion, they could be quite harmful to the public's faith in the system. Romania could use U.S. assistance in formulating guidelines and policies for exercising these authorities and in training prosecutors. End Comment.